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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAUN OSHAY LAVENDER,

Defendant and Appellant.

D059555

(Super. Ct. No. SCD220140)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

This appeal is taken from a judgment of the superior court based on Shaun Oshay Lavender's conviction of failing to appear and proceeds in accordance with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Finding no reasonably arguable appellate issue, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2009 Lavender was arrested and charged with two counts of driving under the influence of drugs or alcohol (DUI) and one misdemeanor count of driving with a

suspended driver's license. Lavender had four convictions for driving under the influence of alcohol or drugs from 1995 to 2002 and the charging information thus alleged that he had suffered several prior DUI convictions (which rendered the current DUI charges felonies rather than misdemeanors), a prior serious felony strike and four prison priors. After posting bail, Lavender was released from custody.

Lavender's attorney moved to dismiss the prior DUI conviction allegations, as well as to suppress the evidence that he was intoxicated on the date of the current offenses (including his poor performance on field sobriety testing). She argued that the prior DUI convictions were improperly classified as felonies, making the current offenses misdemeanors, which police could not validly arrest him for unless they either had a warrant or personally witnessed him driving.

The court denied the motions and later issued a bench warrant for Lavender's arrest after he failed to appear for trial in April 2010. In October 2010, Lavender was arrested in Missouri, transferred to California and, by separate felony information, charged with one count of failing to appear while on bail.

On the prosecutor's motion, the two pending criminal matters against Lavender were consolidated. Lavender waived his right to a jury trial; at trial, the court acquitted him of the driving offenses, finding that although he was grossly intoxicated at the time of the offense, the prosecution had not established beyond a reasonable doubt that he had been driving, but convicted Lavender of the failure to appear charge.

Lavender admitted the prior strike and prison prior allegations and acknowledged that the prior strike rendered him ineligible for probation, but asked the court to strike the

prior strike. The court denied the motion, concluding that although alcohol served as the basis for all of his prior offenses, Lavender was in denial that he had an alcohol problem and that, as a recidivist, he was not "sufficiently outside . . . the sweep [of] the [Three Strikes] legislation," but it did strike the prison prior allegation relating to the prior strike conviction.

The court sentenced Lavender to prison for five years eight months, consisting of the lower term of 16 months, doubled for the prior strike, plus one year for each of the remaining prison prior allegations, with 247 days (165 actual and 82 under Penal Code section 4019) in credits for time served. The court imposed a \$1,200 restitution fine, a \$1,200 parole revocation fine, stayed unless parole was granted or revoked, a \$40 court security fee, a \$30 immediate critical needs account fee and a \$154 criminal justice administration fee and ordered Lavender to submit to DNA testing. Lavender appeals.

The appellate brief filed on Lavender's behalf indicates that his counsel has been unable to identify any argument for reversal and asks this court to review the record for error as mandated by *Wende*. Pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*), counsel's brief identifies the following issues as possible, but not arguable, on appeal:

1. Was there sufficient evidence to support that Lavender failed to appear on a felony charge with the intent to evade the process of the court?
2. Can a defendant be convicted of failure to appear even if he is acquitted of the underlying charge for which he failed to appear?
3. Does Lavender's sentence amount to cruel and unusual punishment?

We invited Lavender to file a brief on his own behalf and he has done so. In it, he contends that the court abused its discretion in denying the motion to strike his 1991 prior strike and not placing him on probation or limiting his sentence to time served.

## DISCUSSION

We have reviewed the record in accordance with *Wende*, considered the *Anders* issues raised by counsel and not found any reasonably arguable appellate issues. We also find Lavender's contention that the court abused its discretion in denying his prior strike unavailing.

A trial court is authorized in its discretion to dismiss a prior strike allegation in the furtherance of justice under Penal Code section 1385. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) In exercising its discretion to dismiss one or more prior strike allegations, the trial court must consider both the constitutional rights of the defendant and the interests of society and determine whether, in light of the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, he is outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. (*People v. Williams* (1998) 17 Cal.4th 148, 161-163; *People v. Orin* (1975) 13 Cal.3d 937, 945.)

The trial court's decision about whether to dismiss a prior strike allegation is reviewable on appeal under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 373-375.) Under this standard, the defendant has the

burden of establishing that the trial court's determination was arbitrary or irrational.

(*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Lavender has not met that burden here. The trial court noted, and defense counsel conceded, that Lavender's repeated alcohol abuse had been a factor underlying each of his prior convictions, including the prior strike (an assault conviction), over the course of many years. This fact alone is sufficient to support the court's denial of the motion to strike Lavender's prior strike.

Lavender has been competently represented by counsel on this appeal.

#### DISPOSITION

The judgment is affirmed.

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McINTYRE, J.

WE CONCUR:

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HALLER, Acting P.J.

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AARON, J.